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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 28

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

REPLY TO BRIEF OF RESPONDENT AND TO BRIEF OF WILLIAM D. MITCHELL, AMICUS CURIAE.

LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

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SUMMARY OF ARGUMENT.

1. Extent of the Power of the Supreme Court under the Rules Enabling Act.
2. The Adoption of Rule 35 Required the Determination of Broad and Important Questions of Public Policy.
3 The Fact That Congress Permitted the Rules to Become Effective Would not Cure the Invalidity of Rule 35.
4. The Contempt Order and the Disposition to be Made of this Case.

ARGUMENT.

1. Extent of the Power of the Supreme Court under the Rules Enabling Act.

Both respondent and Mr. Mitchell[1] take the position that the Rules Enabling Act authorized the adoption of rules covering the entire field of "procedure", including even procedural matters that involve important and broad questions of public policy. Both assert that the line between substance and procedure is easy to mark.

Petitioner's position is that the extent of the rule-making power should be determined by the function of the power. The distinction to be made is, not between substance and procedure, but between what is legislative and what is judicial. Regardless of the ease or difficulty of applying the criteria of substance and procedure (and the difficulty of applying them has been noted repeatedly), they are not the true criteria. And the true criteria are certainly no more difficult to apply than the false.

Neither the respondent nor Mr. Mitchell mentions the careful analyses[2] of the rule-making power made by Thomas W. Shelton, by the report of the Senate Judiciary Committee in 1925, and by recent writers in the American Bar Association Journal, all cited in the supplemental brief of respondent. These analyses support petitioner's contention that questions about the extent of the rule-making power are not answered by decisions made in other situations that this or that matter is procedural or substantive.

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[1] Brief for the Respondent, pp. 9-12, 24-34; Brief of William D. Mitchell, pp. 12-17.

[2] Quoted in Supplemental Brief of Petitioner, 2-5.

Both respondent and Mr. Mitchell[3] express fears that petitioner's interpretation of the Rules Enabling Act would result in confusion and perhaps invalidate many of the Federal Rules of Civil Procedure. That these fears are exaggerated is shown by the comparison of Rule 35 with other rules similar to it in subject-matter, a comparison made in petitioner's first brief.[4] And petitioner does not take the extreme view (attributed to her by Mr. Mitchell) that the enabling act forbids rules that "affect" substantive rights.

2. The Adoption of Rule 35 Required the Determination of Broad and Important Questions of Public Policy.

Both respondent and Mr. Mitchell[5] argue that it is highly desirable that the courts have power to order physical examinations as provided in Rule 35 of the Federal Rules of Civil Procedure. Similar arguments were summarized in petitioner's Brief in Support of the Petition, and petitioner also gave arguments against the desirability of the power.[6] The arguments on both sides of the question show that it is necessary to decide important questions of public policy in deciding whether or not courts should have the power. How far should the courts be permitted to go in compelling a person to expose his or her body to an examiner not of the person's own choosing? How important is the inviolability of the person? Both respondent and Mr. Mitchell consider a compulsory physical examination only as a means of discovery. Its importance is really much greater: the examiner makes the examination to qualify himself as a witness at the trial rather than merely

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[3] Brief for the Respondent, pp. 34-36; Brief of William D. Mitchell, p. 15.

[4] Petitioner's Brief in Support of Petition, pp. 44-46.

[5] Brief for the Respondent, pp. 37-38; Brief of William D. Mitchell, pp. 20-23.

[6] Petitioner's Brief in Support of Petition, pp. 40-44.

to furnish information useful to opposing counsel in preparing for trial. The examiner's testimony, cursory though his examination is likely to have been, is certain to bear a great weight with the jury, a weight disproportionate to the accuracy of the examination. Thus another question of public policy that must be decided is the extent to which a compulsory examination should be permitted in order to qualify a court officer (the examiner) as a witness.

These questions of policy can and should be decided by the legislature. They require judgments about the present state of the science of medicine, about the inviolability of the person, about the length to which a trial court should be permitted to go in influencing the decision of the jury. The legislature is competent to determine these questions. They are not within the province of a court simply because of its specialized knowledge of court practice.

3. The Fact That Congress Permitted the Rules to become Effective Would Not Cure the Invalidity of Rule 35.

Respondent argues[7] that the inaction of Congress in permitting the rules to become effective when they were reported to Congress amounts to a ratification of any rule that may have exceeded the limitation imposed by the Rules Enabling Act; and that therefore in Rule 35 there is in effect an act of Congress authorizing an order for a physical examination.

This argument overlooks the necessity for the presentation of bills of Congress to the President before they become law, as required by Section 7, Article I of the Constitution. In the cases cited by respondent to support its contention,[8] Congress ratified the executive orders involved (which may have exceeded the power delegated by Congress) not merely by failing to act when the orders were

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[7] Brief for the Respondent, pp. 31-33.

[8] *Isbrandtsen-Moller Co., Inc.* v. *U. S.*, 300 U. S. 139; *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297.

reported to it, but by appropriation and other bills which were the product of the usual legislative process, including presentation to the President.

It is significant that Mr. Mitchell in his brief (p. 20) differs from respondent on this matter. "The conclusion that this non-action is equivalent to affirmative legislation approving the rules is inadmissible."

4. The Contempt Order and the Disposition to be Made of this Case.

In view of Mr. Mitchell's contention[9] that the contempt order should not have been issued for disobedience of the order to submit to a physical examination, petitioner wishes to explain why this question has not been raised by her.

The excerpts from the confidential proceedings of the Advisory Committee quoted in Mr. Mitchell's brief (pp. 27-36) indicate that the Advisory Committee intended that contempt orders would not be issued for failure to comply with an order for a physical examination. Petitioner was not aware of the intention of the Advisory Committee from Rule 37 of the Federal Rules of Civil Procedure, although Mr. Mitchell says that Rule 37 carries out the Committee's intention and shows clearly that the contempt order is improper.

Rule 37 (a) (2) says that for failure to submit to a physical examination "the court may make such orders in regard to the refusal as are just, and *among others* the following:" and then subdivision (iv) following lists "an order directing *the arrest* of any party or agent of a party for disobeying any of such orders, except an order to submit to a physical or mental examination." Subdivision (iv) does not speak of contempt, although elsewhere in the same rule—(b) (1)—there is a provision that certain con-

[9] Brief of William D. Mitchell, pp. 8-12.

duct may be considered a contempt of court. This seems to indicate that something other than contempt was meant in the language about arrest in subdivision (iv). Arrest might mean the bringing of a litigant into court to be examined there, a device that would be helpful when a litigant has refused to appear at a deposition hearing. Also, the language quoted above says that orders other than those listed in the rule may be made for a refusal. The language of Rule 37 thus does not seem to indicate that a contempt order is improper when a litigant refuses to submit to a physical examination, particularly in view of the clear and broad language of the statute[10] giving federal judges power to punish by contempt for disobedience of court orders.

For this reason the petitioner has never raised the question of the impropriety of the contempt order for petitioner's disobedience, and, of course, the petitioner is particularly interested in having the court determine that she need not submit to a physical examination. The other remedies for failure to submit mentioned by Mr. Mitchell (such as dismissal of the case) would be almost as effective as contempt in compelling a litigant to submit to the examination.

In any event, petitioner has no objection to either of the two courses set forth on page 25 of Mr. Mitchell's brief, if this court holds that the order to submit to the examination is valid.

Respectfully submitted,

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Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

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[10] 28 U. S. C. sec. 385.

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